In the Supreme Court of the United States

October Term 1975

No. 57-577

CORVALLIS SAND AND GRAVEL COMPANY,
an Oregon corporation,

Petitioner,

v.

STATE OF OREGON ex rel State Land Board,

Respondent.

REPLY BRIEF OF PETITIONER

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SUPPLEMENTARY FACTS

All the property in dispute was originally patented out from the federal government. (App. 1, Exs. 120, 184, 185) Title relates back to the time of entry. 1/

1/ "In an action at law for the recovery of the possession of real property, if either party claims the property as a donee of the United States under the Act of Congress approved September 27, 1850, commonly

The Willamette River above Corvallis, where the disputed property is located, is not considered navigable in its ordinary condition by the federal government. (App. 2)

SUMMARY OF ARGUMENT

I

Definition of Navigability.

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Determining "navigability" is a matter for the federal courts.

The original definition that "navigability" refers to rivers and bodies of water suitable, in their ordinary condition, for commerce, trade and travel has been liberalized by the states to include those bodies of water used for small craft with the result the states claim ownership of streams not navigable under federal law. A re-affirmation is needed that "navigability" refers to waters suitable for commerce, trade or travel.

The title to the beds of navigable waters, being determinable, passes from the state to the riparians when the waters cease to be navigable.

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called the Donation Law by the Acts amendatory thereto, such party from the date of his settlement on the property, as provided in said Acts, is deemed to have a legal estate in fee in the property ..." Oregon Revised Statutes 105.070

The disputed portion of the Willamette River is not "navigable" in the opinion of the Corps or under the definition requiring that the waters be suitable for commerce, trade and travel. It is properly designated a "floatable" stream the proprietary ownership of the bed being vested in the riparians.

II

Submerged Lands Act.

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The Submerged Lands Act, which is a quit claim from the federal government to the states, did not convey any new interest in the beds of navigable fresh water streams to the states nor did it enhance the states' rights in navigable fresh water streams because the federal government had no property to transfer.

III

Extent of States' Interest
a Matter of Federal Law.

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The determination of the extent of the interest of the states in the beds of navigable fresh water streams is a matter to be determined by the federal courts.

IV

Equal Footing Doctrine Not Relevant

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The states did not receive title to the beds of navigable fresh water streams under the equal footing doctrine. This doctrine relates primarily to political and sovereign matters and not to property rights. Under the doctrine newly admitted states are to be treated equally with, but not superior to, the original 13 states. None of the original 13 states held title to the beds of navigable fresh water streams, that title being vested, under common law principles, in the riparians. The non-applicability of the equal footing doctrine is evidenced by the absence of any discussion of the doctrine in such scholarly works as CJS, Farnham, Gould, and Waters and Water Rights published by The Allen Smith Company.

V

Violation of Due Process.

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The first case to indicate that the common law principle of proprietary ownership of the beds of navigable fresh water streams by the riparian was to be modified was Barney v. Keokuk decided by the court in 1876. By that time 38 states had been admitted to the Union and large areas of the land comprising the states yet to be admitted had been settled. These states and prospective states (except Louisiana) followed the common law which vested proprietary ownership of the beds of navigable fresh water streams in the riparians. On achieving statehood all continued the common law in force (except Louisiana). Washington (admitted in 1889), while it adopted the common law, included in its constitution a provision reserving ownership of the beds of navigable fresh water streams

to the states. (This constitutional provision would operate prospectively.) Riparian proprietary ownership could not be retroactively divested by court decision, by statute or by constitutional amendment.

The proposition that it is a violation of due process to retroactively divest the riparian of his proprietary interest in the beds of navigable fresh water streams is not contrary to the decisions of this Court holding that it is for the states to decide what disposition is to be made of the beds of those streams, the states having elected, by adoption of the common law, to award that ownership to the riparians.

VI

Riparian Owns Sand and Gravel.

The sand, gravel and other materials constituting the beds of navigable fresh water streams, are owned by the riparian. This follows from the common law and is based on the fact the removal of sand and gravel and other materials requires a permit from the Corps and does not interfere with navigation. Ownership in the riparian also flows from the fact that the state's interest in the bed is "as a bed" and not in the individual grains of sand, gravel, mud and rocks. In the context of the common law this is expressed as the jus privatum, or proprietary interest of the riparian, as distinguished from the jus publicum, or public interest, which is the property and responsibility of the state.

VII

Public Policy.

The quality of being riparian, especially to navigable waters, may be a land's most valuable feature. It is important and should be protected. The sole source of protection is through the federal courts which should require the states to honor the common law which they adopted.

BRIEF

PROPOSITION I

THE SUBMERGED LANDS ACT DID NOT PASS TITLE TO THE BEDS OF NAVIGABLE FRESH WATER STREAMS TO THE STATES.

ARGUMENT

The Submerged Lands Act (43 USC Sec. 1301(a)(1) did not enlarge the state's ownership of the beds of navigable fresh water streams. Bonelli Cattle Company et al v. Arizona, 414 U.S. 313, 324, 94 S.Ct. 517, 38 L.Ed.2d 526. The act was a quit claim of both tidal and fresh water properties. Its passage was motivated by the decision of the court in United States v. California, 332 U.S. 19, 67 S.Ct. 1568, 91 L.Ed. 1889 (1957) which gave the federal government a "paramount interest" in marginal sea lands. Bonelli, U.S. at 324. The statute is irrelevant to inland waterways. Bonelli, U.S. at 324. The irrelevancy grows from the fact the federal government had no interest in the beds of navigable[2/] fresh water streams which it could quit-claim except where it was the riparian owner.

[2/] The definition of "navigability" is fundamental

PROPOSITION II

THE EXTENT OF THE STATES' INTEREST IN THE BEDS

to a determination of the ownership of the beds of navigable fresh water streams. "Navigability" is to be defined by federal law. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922). Waters are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." The Daniel Ball v. United States, 77 U.S. 999, 1001 (1870); 78 AmJur2d 503, Waters, Sec. 61. "The mere capacity to permit passage in a boat of any size, however small, from one stream or rivulet to another is not sufficient to constitute the former a navigable water of the United States unless the channel is substantially useful for some purpose of interstate commerce." 1 Farnham, Water and Water Rights, 67, Sec. 15, citing Leovy v. United States, 177 U.S. 621, 44 L.Ed. 914, 26 S.Ct. Rptr. 797; United States v. Oregon, 297 U.S. 1, 23 (1934); 1 Farnham 100, Sec. 23; 78 AmJur2d 505, Waers, Sec. 62. (The implication of Bonelli, supra, U.S. at 326, is that when water ceases to be navigable the state's title, being determinable, is divested. Under common law concepts this divestment would follow because there is no longer any jus publicum which requires protection by the state. See also United States v. 1629.6 Acres of Land, (1971) (D.C. Del.) 335 Fed. Supp. 255, Supp. opinion (D.C. Del.) 360 Fed. Supp. 147, affirmed in part and reversed on other grounds (C.A. 3 Del.) 503 Fed.2d 764.)

OF NAVIGABLE FRESH WATER STREAMS IS TO BE DETERMINED

"Navigable" streams should be distinguished from streams which are merely "floatable" as by logs or small craft, the state having no proprietary interest in the beds of floatable streams. 1 Farnham 121, Sec. 25; 78 AmJur2d 820, Waters, Sec. 382.

Courts take judicial notice of navigability or non-navigability. 31 CJS 939-40, Evidence, Sec. 33(1).

The Willamette River in Oregon above Corvallis is not navigable. (App. 2) [On trial Corvallis Sand and Gravel Company acknowledged this portion of the Willamette River to be navigable. This was on the basis of state law.]

[Thompson on Real Property, Vol. 6, 1962 Replacement, Sec. 3074 at page 704 states, "By the common law, even such rivers as the Mississippi, the Missouri, the Ohio, the Hudson, and the Connecticut and other great rivers, above the point where the tide ebbs and flows, would not be navigable rivers, though they are navigable in fact; and therefore, where such a river forms a boundary of land the grantee becomes a riparian owner, and his grant extends to the center of the river." Citing Jones v. Soulard, 24 How. 41 (1860); St. Louis v. Rutz, 138 U.S. 243, 34 L.Ed. 948, 11 S.Ct.Rptr. 337; Hardin v. Jordan, 140 U.S. 371, 35 L.Ed. 428, 11 S.Ct. 808 and numerous state cases.]

The states should not be permitted to extend their claims of ownership to the beds by equating

UNDER FEDERAL COMMON LAW.

ARGUMENT

Ownership of the beds of navigable fresh water streams is to be determined on the basis of federal common law. Bonelli, supra, U.S. at 324 and 325 (latter is dissenting opinion of Mr. Justice Stewart).

Being riparian, especially to navigable water, is a valuable asset of ownership which requires protection under federal common law. Bonelli, supra, U.S. at 326.

PROPOSITION III

THE STATES DID NOT ACQUIRE ANY PROPRIETARY INTEREST IN NAVIGABLE FRESH WATER STREAMS BY VIRTUE OF THE EQUAL FOOTING DOCTRINE.

ARGUMENT

"Equal footing" was a doctrine developed to protect the states in their political and sovereign rights. United States v. Texas, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221, 1226-27 (1950); Case v. Toftus, 39 Fed. 730 (1889)[3/]; 81 CJS 923, States,

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"navigable" with "floatable" in order to support a claim of proprietary ownership. 78 AmJur2d 506, Waters, Sec. 62. The requirement that the water be suitable for commerce, trade and travel, on a substantial basis, should be reaffirmed.

3/"The doctrine that new states must be admitted

Sec. 22(2); and Hanna, "Equal Footing in the Admission of States", III Baylor L.Rev. 519, 530 (1951)

The equal footing doctrine was first adopted in the Northwest Ordinance (1784) and was reenacted in

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into the Union on an 'equal footing' with the old ones does not rest on any express provision of the constitution, which simply declares (article 4, sec. 3) 'new states may be admitted by congress into this Union,' but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,---a union of political equals. Pollard v. Hagan, 3 How. 233; Permoli v. New Orleans, Id. 609; Strader v. Graham, 10 How. 92.

"But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The anti-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held, as the political successors of the British crown.

"The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government."

[Judge Deady's opinion contains interesting observations on what the courts have done in the name of equal footing.]

1789 at the time of the adoption of the constitution. The doctrine grew out of the controversy between previously admitted and newly admitted states over the extent of land holdings of existing states outside of their boundaries. Hanna, III Baylor L.Rev., supra, at page 523. Equal footing was not relevant to the proprietary ownership of the beds of navigable fresh water streams. The law was settled that the beds of navigable fresh water streams belonged to the riparian. Vol. 1, Water and Water Rights, The Allen Smith Co., 1967, pp 267-268, Sec. 42.2 (hereinafter cited as Smith); Thompson on Real Property, Vol. 6, 1962 Replacement, Sec. 3074 at p. 704.[4/] Until the court's decision in Barney v. Keokuk in 1876, infra, p 14 the states had no proprietary interest (jus privatum) in the beds of fresh water streams but did have the duty to protect the public right of navigation (jus publicum). The jus publicum, as an aspect of sovereignty, constituted a form of limited ownership and was a trust obligation for the protection of the public at large. With the passage of time the purpose and scope of the equal footing doctrine became obscured, as did the distinction between the concepts of jus publicum and jus privatum, and resulted in

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[4/] The brief of Utah-New Mexico as Amici Curiae acknowledges that, "...the 13 Original States viewed tide waters as navigable (subject to public use) and waters above the ebb and flow of the tide as non-navigable (privately owned) because this had been the law of England, as explained in Section III of this brief. Riparian rights were more extensive in non-navigable waters, but they applied to a lesser extent in navigable waters." Page 69.

claims by subsequently admitted states that the equal footing doctrine granted them the proprietary ownership of the beds of navigable fresh water streams even though the original states made no such claims at the time of formation of the Union. Decisions holding that the equal footing doctrine gave the states proprietary ownership of the beds of navigable fresh water streams placed newly admitted states in a position superior to that of the original states all of which adhered to the common law (with minor modifications) under which the proprietary ownership of the beds of navigable fresh water streams was in the riparians.[5/]

The decisions which grant the states proprietary ownership on the basis of equal footing are erroneous for four reasons:

1. Equal footing means that new states are not less or greater or different in dignity or power from states previously admitted. United States v. Texas, supra, U.S. at 1227.

2. The original states did not claim ownership of the beds of navigable fresh water streams.

3. Decisions holding that equal footing gives the new states proprietary ownership are based on an historical misunderstanding.

4. Failure to distinguish between the jus publicum and the jus privatum as it applies to fresh water navigable streams.

[5/] Brief of Petitioner, pp 10-12.

Bonelli, supra, U.S. at 318[6/], perpetuates the error unless "title" is limited to the jus publicum. (Bonelli cites Pollard Lessee v. Hagen, 3 How. 212, 11 L.Ed. 565 (1845); Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331, 14 S.Ct. 548 (1893); and Weber v. Board of Harbor Commissioners, 18 Wall. 57, 65-66, 21 L.Ed. 798 (1873) all of which involved tide water. When the states became sovereign they did, under the common law, acquire both the jus publicum and the jus privatum in tide water.)

Granting unqualified ownership of the beds of navigable fresh water streams to the states admitted since the formation of the Union makes them superior to the original states, something not intended under equal footing.[7/] [8/]

PROPOSITION IV

THE RIPARIAN CANNOT BE DIVESTED OF HIS COMMON LAW PROPRIETARY OWNERSHIP OF THE BEDS OF NAVIGABLE

6/ "Title to lands beneath navigable waters pass from the federal government to new states, upon admission to the Union, under the equal footing doctrine."

7/ Infra, Proposition IV, commencing p. 13.

8/ Corpus Juris Secundum (Navigable Waters and States), Farnham, Gould and Smith apparently do not include equal footing in their texts as a basis for state ownership of navigable fresh water streams. American Jurisprudence discusses it. 72 AmJur2d 419, States, Sec. 13.

FRESH WATER STREAMS.

ARGUMENT

Barney v. City of Keokuk, 94 U.S. 324, 24 L.Ed. 224 (1876) was the first decision of the court to indicate that proprietary ownership of the beds of navigable fresh water streams was vested in the states. Smith, 257, Sec. 41.2(B). The case involved the ownership of a portion of the bed of the Mississippi River in the state of Iowa. Iowa law declared the state to be the owner of the beds of navigable fresh water streams.

After pointing out that Genesee Chief v. Fitzhugh, 12 How. 443, declared that the Great Lakes were subject to admiralty jurisdiction, and acknowledging that Martin v. Waddell, 16 Pet. 367, Pollard, supra, p 13, and Good Title v. Kibbee, 9 How. 471, all involved tide water, the court, with some hesitation, stated:

> "...but whatever may be the true rule on this vexed question [ownership of the beds of navigable fresh water streams], and whether we rightly comprehend the Iowa decisions or not, we have no doubt that the city authorities of Keokuk, representing the public, had the right to widen and improve Water Street to any extent on the riverside, by filling in below high water, and building wharves and levies for the public accommodation."

None of the authorities, such as Jones, supra, p. 8, which held that the riparian owned the bed of navigable fresh water streams, was cited.

The foregoing is something less than a positive affirmation of state ownership, yet is the cornerstone of the states' claim of proprietary ownership.

The following illustrates the divesting of riparians of their proprietary interest:

Oregon was admitted to the Union in 1859. Its newly adopted constitution continued in force all statutes of the territorial government, one of which adopted the common law.[9/]

The Constitution of Oregon did not reserve the ownership of the beds of navigable streams to the state nor did any state statute make such a reservation.[10/]

On the basis of Jones (1860), supra, p 8, which followed the established common law, the riparians in Oregon became the proprietary owners of the beds of navigable fresh water streams within its boundaries.

(Apparently only the state of Washington (admitted in 1889) attempted to reserve to itself the

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9/ Brief of Petitioner, p 12.

10/ Respondent in its brief, pp 3, 5 and 16, cites Oregon Revised Statutes, Sec. 274.025 for the proposition that the state by statute has claimed ownership of the beds of navigable fresh water streams. The citation is misleading. Until the adoption of the Laws of 1967, Chapter 421, Section 100, this statute related only to navigable waters.

ownership of the beds of navigable fresh water streams[11/], all other states except Louisiana having adopted the common law. 15A CJS 40, Common Law, Sec. 11.)

The rationale for the proposition that vested proprietary rights of the riparian are protected against retroactive decisions, legislation or constitutional amendments is as follows:

1. Property rights are "sacred". 16AmJur2d 691, Constitutional Law, Sec. 362.

2. Riparian rights are natural property rights and are not easements or appurtenances. Gould, Law of Waters, Sec. 148 (hereinafter cited as Gould); Thompson on Real Property, Vol. 1A (1967 Replacement) Sec. 264.

3. A vested right is defined as:

> "...an immediate fixed right of present or future enjoyment."

11/ In that article [Article 17 of the Constitution of Washington], the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." (Separate opinion of Mr. Justice Stewart.] Hughes v. Washington, 389 U.S. 290, 19 L.Ed. 530, 535, 88 S.Ct. 438 (1967). [The constitutional provision would operate prospectively only.]

and

> "...the term is not to be restricted to any narrow or technical meaning applicable to these words in the law of real property. A right is vested when there is an ascertained person with a present right to present or future enjoyment."
>
> 16 AmJur2d 760, Constitutional Law, Sec. 421

4. Vested rights may be created by the common law. No matter how created, they are entitled to protection and should be changed only by statutory enactment. 15 AmJur2d 811, Common Law, Sec. 15; 16 AmJur2d 762, Constitutional Law, Sec. 422; Moon v. Bullock, 151 P2d 765, 771 (Idaho) (1944)12/

5. The doctrine of stare decisis is more strictly followed where property rights, especially rights in

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12/"We must recognize that it is the problem of the Legislature, and not of the court, to modify the rules of the common law. (Citing authority) The court has no more right to abrogate the common law than it has to repeal the statutory law. (Citing authority) In other words, courts may extend old principles to new conditions, and may determine new or novel questions by analogy, and may even develop and announce new principles made necessary by changes wrought by time and circumstances, but under our constitutional system of government, courts cannot legislate; and they cannot abrogate, modify, repeal or amend rules long established and recognized as parts of the law of the land."

real property, are concerned, and where rights have become vested in reliance on the precedents. 20 AmJur2d 831, Courts, Sec. 196.

6. Once vested, property rights cannot be retroactively divested by the legislature, by the courts, by the executive or by constitutional amendment. Constitution of the United States, Amendment XIV; 16 AmJur2d 767, Constitutional Law, Sec. 426; 16 AmJur2d 930, Constitutional Law, Sec. 542; 16 AmJur2d 933, Constitutional Law, Sec. 543; 16 AmJur2d 933, Constitutional Law, Sec. 544; 16 CJS 1176, Constitutional Law, Sec. 216; Hughes, supra, p 16[13/]; 93 CJS 748, Waters, Sec. 71 citing Brewer-Elliott, supra, p 7, and United States v. Champlin Refining Co., CCS Okla., 156 F.2d 769, affirmed 67 S.Ct. 1346, 331 U.S. 778, 91 L. Ed. 1818, rehearing denied 67 S.Ct. 1747, 331 U.S. 869, 91 L.Ed. 1872; Thompson on Real Property, Vol. 1A, 1964 Replacement, Sec. 274.

7. The common law is the foundation of due process. 16 AmJur2d 259, Constitutional Law, Sec. 17; 16 AmJur2d 930, Constitutional Law, Sec. 540, 16 AmJur 2d 933, Constitutional Law, Sec. 543; 16 CJS 116, Constitutional Law, Sec. 36; 16 CJS 140, Constitutional Law, Sec. 44; 16 CJS 150, Constitutional Law, Sec. 49.

8. Vested riparian rights cannot be divested. Bonelli, supra, U.S. at 331, citing Hughes, supra, p 16; Farnham, Waters and Water Rights, Sec. 29, p 136, et seq.

The brief of Utah-New Mexico acknowledges:

13/ Separate opinion of Mr. Justice Stewart.

> "Of course, States cannot change rules of property law and give them retroactive effect, so as to divest private rights validly acquired and vested under the earlier rules, ..." (P. 13)

Examples where vested property rights have been protected are:

1. A Spanish grant of tide water land in San Francisco Bay cannot be divested after acquisition of the territory by the United States. Knight v. United States Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1893).

2. Vested water rights cannot be interfered with by the legislature or the courts. 78 AmJur2d 719, Waters, Sec. 276, note 82; 93 CJS 697, Waters, Sec. 7, note 71 citing Dill v. Killip, 174 Or 94, 103, 147 P2d 896 (1944).

3. Where a statute authorized the lessee of school land to purchase it, repeal of the statute did not divest the lessee of his right of purchase. Pfieffer v. Ableidinger, 89 NW2d 568 (Neb.) (1958).

4. Rules of evidence cannot be changed to take away vested property rights. Lowe v. Harris, 17 SE 539 (N.C.) (1893).

5. The state cannot, by passing a statute declaring a formerly non-navigable stream navigable, divest the riparian of his ownership of the bed. Brewer-Elliott, supra, U.S. at 60.

6. Rule in Shelley's case can only be changed

by prospective legislation, not by courts. Riegel v. Lyerly, 143 SE2d 65, 265 NC 204 (1965).

7. The legislature cannot take away husband's vested rights to alienate homestead subject only to wife's dower. Gladney et al v. Syndor et al, 72 SW 654 (Mo.) (1903).

8. A state statute adopting the common law operates to transfer to all riparian proprietors within the state the title to the bed of tideless water streams. Champlin, supra, p 18; 78 AmJur2d 821, Waters, Sec. 384, note 71, citing Donelly v. United States, 228 U.S. 243, 57 L.Ed. 820, 33 S.Ct. 449.

Riparian ownership of the beds of navigable fresh water streams, once vested, cannot be divested retroactively by constitutional amendment, by statute or by court decision.

The foregoing is not inconsistent with the announced doctrine of this court:

> "...we continue to adhere to the principle that it is left to the states to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the state."
>
> Bonelli, supra, U.S. at 319

At the time of admission each state had the privilege of including in its constitution, or possibly in the statutes which became effective concurrently with their respective constitutions, a provision reserving the ownership of the beds of

navigable fresh water streams to the state. Instead of such a reservation by constitutional provision (which Washington alone enacted), the states adopted the common law (except Louisiana) under which the riparians became the owners of the beds. This constituted an election by the states to make the riparian the owner to the center of the stream. Having so elected, the states cannot retroactively divest the riparians of their ownership by court decision, by legislative action or by constitutional amendment.

The first attempt in Oregon to divest riparians of their common law ownership was in Hume v. Rogue River Packing, 51 Or 237, 92 Pac 1065 (1908) which was a case involving both tide and fresh water portions of the Rogue River.[14/]

In Hume the court, at 246, relied on Martin, supra, p 14, Shively, supra, p 13, and Knight, supra, p 19 (all of which were tide water cases), for the proposition that when Oregon joined the Union it became the owner of land under all navigable waters. The decision typifies those in many states where courts have sought retroactively to divest rights created under the common law through reliance on tide water cases.

The states rely heavily upon Martin v. Waddell, 16 Pet. 234 (1842) for the proposition that the state owns the beds of navigable waters. Martin involved tide waters and as such is not authority for the proposition that the states own the beds of navigable fresh

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14/Earlier cases such as Johnson v. Knott, 13 Or 308, 10 Pac 418 (1894) dealt with the lower reaches of the Willamette River near its confluence with the Columbia which is tidal water.

water streams.

Divestment of the riparian's proprietary ownership is a violation of due process no parallel for which could be found in the law.

PROPOSITION V

THE STATE DOES NOT OWN THE SAND AND GRAVEL IN THE BEDS OF NAVIGABLE FRESH WATER STREAMS.

ARGUMENT

Oregon contends that State v. Gill, 259 Ala 177, 183, 66 S2d 141, 145 (1953) (cited in Bonelli, supra, L.Ed. at 536, for the proposition that the "...state's title is to the 'river bed as a bed'"), does not deal with the ownership of the materials of the bed itself while in place nor with whether the state has a proprietary interest in the beds and therefore is not relevant to our case.

Gill was a suit to quiet title brought by the state against a riparian on Mobile Bay (tidal waters) the title to which would be in the state. The Corps had dredged a channel in Mobile Bay, removing the materials from the bed and depositing them adjacent to the bank owned by the riparian resulting in the creation of new land in the form of an artificial accretion. The Alabama court ruled that the accretion belonged to the riparian, stating that the state's ownership of the bed:

> "...is a title to the bed as a bed and not to the individual grains of sand or lumps of mud which constitute the land making up the bed."

Under the concept of jus publicum removal of the bed materials must interfere with navigation before the state's interest is violated. The state's interest in the bed "as a bed" is to enable ships to anchor, to control impediments to navigation and to control currents and establish channels. The interest is not proprietary.

(Under Oregon law gravel is part of the soil. Whittle v. Wolff, 249 Or 217, 437 P2d 114, 117 (1968).)

The thrust of Bonelli, supra, is that the states' interest in the beds of navigable streams must be related to the states' proper interest in navigation because of its sovereignty. Bonelli, supra, U.S. at 321[15/].

Here, Corvallis Sand removed sand and gravel materials from the bed of the Willamette River under permits issued by the Corps (Exs. 280-307) which would not have permitted the removal if there had been any interference with navigation. If there had been interference with navigation the State should have proceeded under its police power to protect the public interest. (As a matter of river hydraulics, when sand and gravel are removed the river normally replaces them.)

Bonelli, by citing Gill, recongizes that the

15/"Historically, the title to the beds beneath navigable waters is held by the sovereign, Barney v. Keokuk, 94 U.S. 324, 338, 24 L.Ed. 224 (1876), as a public trust for the protection of navigation and related purposes."

states have no proprietary interest in the beds of navigable fresh water streams and in particular that they have no interest in the removal of sand and gravel material unless the public interest is jeopardized. Under Oregon law sand and gravel are part of the soil. Whittle, supra, p 23.

State also relies upon Wear v. Kansas, 245 U.S. 154, 158-159 (1917). Wear was based on the Kansas law which declared the riparian's ownership ends at the bank. Siler v. Dreyer, 183 Kan 419, 327 P2d 1031 (1956). Bonelli overrules Wear by limiting the state's interest to the bed "as a bed".

(The importance of the ownership of sand and gravel grows out of the fact the State of Oregon recovered a judgment against Corvallis Sand for $75,000 as royalty for sand and gravel materials removed from the bed of the Willamette River. If the sand and gravel is not owned by the state the judgment is void.)

CONCLUSION

> "Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters. This difficulty and diversity of result has arisen from either failure to perceive clearly the common law principles applicable, or a hesitation to apply them for fear of the result."
>
> Farnham, Sec. 30 at p 165. Accord, 56 AmJur 864, Waters, Sec. 451

One result of the confusion has been to victimize the riparian in his claim of proprietary ownership of the beds of navigable fresh water streams. He has been denied proprietary ownership granted him by the common law by retroactive court decisions, statutes, and constitutional amendments. He has also been victimized by definitions of "navigable" which ignored the basic requirement that navigability be related to commerce, trade and travel. Such liberal definitions have extended the claims of states to ownership of the beds of rivers and lakes which in fact were not navigable under the federal test but merely floatable.

Federal courts have acquiesced to the states in their search for grounds to claim the proprietary ownership of the beds of navigable fresh water streams. The chief means of expanding state claims have been threefold:

1. By liberalizing the definition of "navigable" or "navigability" as above set forth.

2. By claiming ownership under the equal footing doctrine. This claim is historically erroneous as the original 13 states did not claim or have ownership of the beds of navigable fresh water streams with the result newly formed states claim a right which is preferential to that of the original states.

3. By claiming proprietary ownership under the guise of "sovereignty". This claim results from the mistaken concept, acquiesced in by the federal courts, that proprietary ownership, the jus privatum, and the public right, the jus publicum, are merged into a common concept of ownership flowing from sovereignty. This concept is historically and legally erroneous.

The public rights of navigation, fishery and recreational uses can be protected under the concept of jus publicum and under the police power. There is no need for the state to have a proprietary interest in order to protect the public right. The only reason, and the true but unacknowledged reason, the states seek proprietary ownership is to garner available revenues for the benefit of the public treasury. The profit motive does not justify the violation of due process.

Historically the riparian owned the sand and gravel materials in the beds of navigable fresh water streams. He was free to remove these materials so long as he did not interfere with the public right. In our country the Corps has assumed the obligation of protecting the public right by requiring a permit to remove materials from the beds of navigable fresh water streams, such permits not being issued where the public right would be interfered with. With the permit as a condition precedent to removal, the states cannot sustain their position that they must own the sand and gravel materials in order to protect the public. Again, the motivation is for profit, not for protection of the public's proper rights.

Property rights are sacred. It is an anomaly in the law that the riparian has been denied equal status with owners of other types of property. By making the riparian the unequivocal proprietary owner, ad valorem tax revenues will be generated, the riparian will protect the beds and banks because he will be concerned, he will have access to the water and, one of his chief assets, that of "riparianness" will be protected. Bonelli, supra, U.S. at 326. If the riparian is not granted his proper rights the states can fill in the

bed below high water mark, destroy riparianness and authorize structures, such as buildings, to be erected between the riparian and the water. Such a use is made likely by the desperate search of the states for additional sources of revenue.

There is a simple and sensible solution to the problems generated by two centuries of confusion: adopt the common law as the federal law. The states should be required to honor the common law which they adopted. The confusion would disappear and the public and the riparian would be protected in their proper rights.

RELIEF REQUESTED

Corvallis Sand and Gravel Company should be awarded all of the disputed property free and clear of any claim of State of Oregon. The judgment awarding damages to State of Oregon should be set aside.

Respectfully submitted,

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